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No. 02-414

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT,

Petitioner,

v.

DAVID M. CHAMPAGNE, SR., JIMMY GUILLORY, LINDA GUILLORY, CHRIS GREEN as co-tutor of the minor child, SETH LeBLANC, DEBORAH ELLENDER as co-tutor of the minor child, SETH LeBLANC, MARIA WAGUESPACK on behalf of the minor child, CYNTHIA WAGUESPACK, SILENCE DUPLANTIS, and DURPHY BOURQUE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Sixteenth Judicial District Court, Iberia Parish

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. *Certiorari* is warranted and appropriate.

Respondents argue that there is no conflict between the Louisiana and Washington Supreme Courts regarding the applicability of Section 409 to accident reports. They reason that the Louisiana decisions depend on factual determinations regarding the use of these materials, while the Washington decision on the application of Section 409 to accident reports in the hands of various agencies is *dicta* because the case was decided on the unconstitutionality of the 1995 amendment. Opp. 5-6.

The Louisiana Supreme Court did not offer any detailed explanation of its holdings in *Fraley v. State of Louisiana, through its DOTD*, 2001-CC-2467 (La. 9/7/01), 795 So.2d 1217; or *Rivers v. Hill*, 2001-CC-2496 (La. 10/10/01), 799 So.2d 486. However, these decisions certainly reflect the conclusion that documents in the possession of the police would not be protected by Section 409. Respondents rely upon a quote from *Irion v. State ex rel. Dept. of Transp. and Dev.*, 98-CA-2616 (La. App. 1 Cir. 5/12/00), 760 So.2d 1220, *writ denied*, 773 So.2d 727 (La. 11/13/00). Opp. 6. The quoted language emphasizes the fact that accident reports have historically been collected by the Department of Public Safety and Corrections (DPSC) for other purposes besides Section 152, and reflects the same reasoning as the concurring opinion in *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, ___ U.S. ___, 2002 U.S. LEXIS 3044 (4/29/02). In that concurring opinion, Justice Madsen reasoned that litigants should be able to discover and rely upon accident reports from a law enforcement agency even if those same reports were not discoverable from the highway department. Justice

Madsen criticized the majority for dismissing this distinction as inconsequential. *Id.* at 658.

The majority in *Guillen*, however, did not dismiss Justice Madsen's (or Louisiana's) distinction as inconsequential. Rather, this distinction was rejected as "unsound in principle and unworkable in practice." *Id.* at 646. Based upon the affidavits in the record, the majority in *Guillen* found that the accident reports would have been protected by Section 409. *Id.* at 645. It was that finding which forced the majority to address the constitutional issues. The rejection of Justice Madsen's (and Louisiana's) distinction was not *dicta*.

Respondents dispute the relevance of the large number of road hazard cases brought against the State of Louisiana, and the large size of the State's risk management budget for these cases. Opp. 10. These matters are relevant to demonstrate the significance of the issues in this case, which is part of DOTD's burden under Supreme Court Rule 10(b) in establishing the propriety of *certiorari*. This is not a rare issue, or one that would affect few cases or cases involving only small sums; rather, it is an important issue that merits granting *certiorari*.

II. Section 409 applies to accident reports.

A. Section 409 applies to accident reports because highway safety evaluation is *one* purpose for these materials.

Respondents argue that Section 409 should be interpreted as not applying to accident reports because these documents are prepared primarily to provide information

for the parties to an accident. Opp. 8-9, *citing* LA. REV. STAT. ANN. 32:397, LA. REV. STAT. ANN. 32:398.

This argument misses the point. It is undisputed that assisting the parties is a purpose for accident reports. Regardless, since the mid-1970s, highway safety evaluation has *also* been a purpose for accident reports, and in fact a primary purpose. *See* DOTD's Petition, pp. 11-15; Exhibits 1-9.

Numerous courts have recognized that Section 409 applies to materials that were not created *solely* for safety evaluation purposes. *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993); *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 n.3 (8th Cir. 1992); *Powers v. CSX Transp., Inc.*, 177 F.Supp.2d 1276, 1278 (S.D.Ala. 2001); *Mackie v. Grand Trunk Western R.R. Co.*, 544 N.W.2d 709, 711 (Mich. App. 1996); *Seaton v. Johnson*, 898 S.W.2d 232, 237 (Tenn. App. 1995). Section 409 requires only that materials be compiled or collected *for* the purpose of highway safety, not "*exclusively and only*" for this purpose. Had Congress meant to restrict the statute in this manner, it could have so provided.

Before 1995, Section 409 applied only to materials "compiled" for highway safety evaluation purposes. In *Wiedeman v. Dixie Electric Membership Corp.*, the Louisiana Supreme Court refused to apply the statute to accident reports, reasoning that they were "collected" for highway safety purposes, but were not themselves "compiled" for such purposes. 627 So.2d 170, 173 (La. 1993), *cert. denied, Louisiana Dept. of Transp. and Dev. v. Wiedeman*, 511 U.S. 1127 (1994). Congress then amended Section 409 to apply to materials "compiled *or collected*" for highway safety purposes. H.R. Rep. No. 104-246, § 328,

at 59 (1995) (emphasis added). The purpose of this amendment has been universally recognized as being to reverse *Wiedeman* and similar cases. *Reichert v. State, DOTD*, 96-C-1419 (La. 5/20/97), 694 So.2d 193, 198; *Palacios v. Louisiana and Delta R.R. Inc.*, 98-CC-2932 (La. 7/2/99), 740 So.2d 95, 97; *Coniker v. State of New York*, 695 N.Y.S.2d 492, 495 (N.Y.Ct.Cl. 1999). Congress was undoubtedly aware that accident reports "collected" for highway safety purposes *also* have other purposes, but nevertheless clearly intended to overturn the result in *Wiedeman*.

Traffic counts serve as a tool to analyze problems with congestion and to plan for future development; they are not collected solely for safety enhancement. If Section 409 does not apply to accident reports because they serve multiple purposes, then the traffic counts and other raw data that were also at issue in *Wiedeman* would be similarly unprotected. *Id.*, 627 So.2d at 173. *See also Rick v. State of La., Dept. of Transp. and Dev.*, 93-C-1776 (La. 1/4/94), 630 So.2d 1271, 1276-77; *Tardy v. Norfolk Southern Corp.*, 659 N.E.2d 817, 820-21 (Ohio App. 1995). The result that Congress clearly intended from the 1995 amendment would be completely undone.

Thus, the fact that accident reports are created for other purposes *in addition* to highway safety evaluation does not exclude them from Section 409.

B. Accident reports are "compiled or collected" within the meaning of Section 409.

Respondents argue that Section 409 should be interpreted as not applying to accident reports because the police neither collect nor compile accident reports, but

simply "prepare" them; while Louisiana Highway Safety Commission (LHSC) of the DPSC is the entity that "collects" the accident reports, and DOTD is the entity that "compiles" them into safety evaluation reports. Opp. 8-9. This "prepared-versus-collected" distinction is reminiscent of the discredited "collected-versus-compiled" distinction that was drawn in *Wiedeman* and rejected by Congress with the 1995 amendment to Section 409.

Respondents' argument improperly assumes that there can be only one stage of "collecting" or "compiling" data or reports for safety purposes. To the contrary, there are multiple stages, including accident report preparation as well as subsequent use of the reports.

The process of "preparing" the accident reports involves obtaining and assembling the various items of information on the accident report form from observations, witness statements, and other sources into a single accident report. *See* Accident Reports, Exhibits 1 and 2; MODEL MINIMUM UNIFORM CRASH CRITERIA, Exhibit 3. The police "collect" and then "compile" scores of data items into each accident report. Referring to this process as "preparing" the accident reports does not change these facts.

C. Plaintiffs do not need to introduce accident reports regarding other accidents in order to establish DOTD's notice of a defect.

Respondents claim that Section 409 should be interpreted as not applying to accident reports because such application would preclude plaintiffs from meeting their burden under LA. REV. STAT. ANN. 9:2800 of proving that

DOTD had knowledge of alleged highway defects. Opp. 3. This argument is a red herring.

The basis alleged by Respondents for DOTD's liability in this matter is the design of the intersection of U.S. Highway 90 and Louisiana Highway 88. Respondents complain that this design improperly omitted an overpass, incorporated a curve that impaired drivers' view of cross-traffic, set a speed limit that was too high, and used a stop sign instead of a stop light. Plaintiffs' Petition, ¶¶ 9-12.

It is nonsense to suggest that Respondents need accident reports to establish DOTD's knowledge of the defects they have alleged. DOTD obviously knows that there is no overpass at the intersection. Just as obviously, DOTD knows that there is a (very slight) curve on the U.S. 90 approach. If these features (or the speed limit or stop sign) were negligently designed, as Respondents allege, then an examination of the applicable design standards would bear this out. The requirement of notice to a governmental entity is inapplicable where the entity itself (or its contractor) *created* the allegedly defective condition. *See Whatley v. City of Winnfield*, 802 So.2d 983, 986 (La. App. 2 Cir. 12/5/01), *writ denied*, 811 So.3d 939 (La. 3/22/02); *Pickens v. St. Tammany Parish*, 323 So.2d 430, 433 (La. 12/8/75).

Proof of DOTD's knowledge of a hazardous condition is necessary only in cases where neither DOTD nor its contractor created the condition, such as where vegetation has overgrown a stop sign, a warning sign has been knocked down or stolen, or a highway shoulder has eroded. *Whatley*, 802 So.2d at 986; *Pickens*, 323 So.2d at 433. Even in such cases, DOTD's Maintenance Standards Manual requires the department to inspect all highways every two

weeks, providing either actual or constructive knowledge of defects created by others.[1] *See Duffy v. State ex rel. Dept. of Transp. & Dev.*, 95-1398 (La. App. 1 Cir. 2/23/96), 668 So.2d 1349, 1353. Respondents do not need six years of accident data to prove their case, if they have one.

D. The literal terms of Section 409 should not apply to the accident report for the accident at issue in a particular case.

Applying Section 409 to accident reports makes sense. Otherwise, plaintiffs could use accident reports to establish the sheer number of other accidents at the same location, but DOTD would be precluded from introducing safety evaluation reports demonstrating that the accident rate at that location is actually low, or supporting DOTD's decision to prioritize limited highway safety funds by upgrading safety facilities first at other, more accident-prone locations. Congress cannot have intended such an unfair imbalance. Alternatively, DOTD would have to waive the protection of Section 409 in many or most cases by introducing the reports that place the raw accident numbers into proper context. In turn, this would defeat the universally-acknowledged purpose of Section 409 of preserving candor, since the evaluator would have to assume that his reports might someday have to be used in

[1] DOTD did raise LA. REV. STAT. ANN. 9:2800, along with another statutory limitation on governmental liability, in its Answer; and to the extent Respondents seek to establish liability based upon a maintenance problem or an alleged defect created by someone else, its restrictions will apply.

litigation. Congress cannot have intended to defeat its own purpose in enacting the statute.

However, Respondents raise an important point when they note that Section 409 as written would bar discovery or consideration of the accident report for the very accident that is the subject of the lawsuit.[2] Opp. 11.

While accident reports themselves are generally inadmissible, photographs, blood tests, witness statements, and other items contained in accident reports are frequently used in lawsuits. In fact, this may be the only, or at least the primary, direct evidence about the accident. Thus, applying Section 409 literally could deprive all automobile accident litigants (both plaintiffs and defendants) of evidence *of their own accident*. A literal application would make such litigation nearly impossible, which *would* be an absurd result, and was certainly not the intent of Congress

This Honorable Court has previously recognized that it can limit the literal terms of a statute to avoid a truly absurd result that is "so gross as to shock the general

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[2] Respondents actually argue that Section 409 applies *only* to the accident report for the accident at issue in a given case. Opp. 8. Respondents apparently reach this bizarre result by misconstruing the description of the types of *actions* where the statute applies (those arising from any occurrence at a location mentioned therein), as if this description related instead to the types of *reports* to which it applies. Correctly construed, Section 409 applies to all accident reports involving the *location* where the accident in a given case occurred, not just accident reports involving the *accident* at issue.

Interestingly, Respondents appear to concede that Section 409 *can* apply to accident reports, though they mistakenly argue that it applies *only* to the accident report for the accident at issue.

moral or common sense," where "there is something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930).

For example, the Court applied this principle where a sheriff was charged with violating a federal criminal statute forbidding obstruction of the mail, when the sheriff arrested a mail carrier who had been indicted for murder. *U.S. v. Kirby*, 74 U.S. 482, 486-87 (1868). The Court found that the statute had no exclusion for obstructions due to lawful acts, *i.e.*, carrying out an arrest warrant. *Id.* at 486. Nevertheless, the Court refused to apply the statute to obstruction of the mail caused by arresting the carrier indicted for murder, because "the common sense of man" requires such a limitation. *Id.* at 487.

It would similarly be an affront to common sense to apply Section 409 to the accident report for the accident at issue, and therefore the statute should not be applied in this manner. Nor does it appear that Congress intended such a result. *Wiedeman*, which the 1995 amendment was enacted to reverse, excluded accident reports for *other* accidents from Section 409, not the report for the accident at issue. 627 So.2d at 173. It is the use of the accident reports for other accidents that Congress sought to preclude. This is precisely the type of situation where this Court has recognized that it can and should carve out an exception to the literal language of a broadly-drawn statute to avoid an absurd and unintended result.

E. Section 402(k) also protects accident reports.

Respondents urge that Section 402(k) applies only to the accident report for the accident at issue in a given

case. As with Respondents' similar argument regarding Section 409, addressed at footnote 2 above, this reasoning misconstrues the statute. The limitation on the types of *actions in* which the statute applies (arising out of any matter mentioned in the report, *etc.*) does not govern the types of *reports to* which it applies. Rather, like Section 409, Section 402(k) applies to *all* accident reports, and should be judicially constrained so that it does not apply to the report for the accident at issue in a given case.

CONCLUSION

For the foregoing reasons, and those set forth in DOTD's Petition, *certiorari* is warranted in this case.

Respectfully submitted,

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